United States Department of Labor
Employees' Compensation Appeals Board

S.M., Appellant	)	
and	)	**Docket No. 18-1574**
	)	**Issued: March 27, 2019**
DEPARTMENT OF VETERANS AFFAIRS, EDITH NOURSE ROGERS MEMORIAL VETERANS HOSPITAL, Bedford, MA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 14, 2018 appellant filed a timely appeal from a June 20, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has met his burden of proof to establish an injury in the performance of duty on November 13, 2017, as alleged.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On December 4, 2017 appellant, then a 58-year-old boiler plant operator, filed a traumatic injury claim (Form CA-1) alleging that, on November 13, 2017, he sustained a back sprain in the performance of duty. He indicated that he "fell as he went to sit back down in his chair." Appellant stopped work on November 14, 2017.[2]

On the reverse side of the claim form, appellant's supervisor indicated his disagreement with appellant's description of the injury. He related that appellant had walked around during the day without making complaints and had not mentioned his injury until the end of the day. Appellant's supervisor also alleged that appellant's injury was caused by willful misconduct. He explained that appellant was participating in an alternative dispute resolution meeting and became emotionally reactive.

In a development letter dated December 5, 2017, OWCP informed appellant that the evidence of record was insufficient to establish his claim. It advised him of the type of factual and medical evidence necessary to establish his claim and provided a questionnaire for completion. OWCP afforded appellant 30 days to provide the necessary evidence.

In a December 8, 2017 letter, the employing establishment, controverted appellant's claim for continuation of pay (COP).

OWCP also received a November 22, 2017 e-mail from R.M., chief of engineering service, who related that he was present during a mediation session when appellant became emotionally irate about the discussion. R.M. reported that appellant kept his left hand on his chair's armrest when he stood up to hand the mediator a document. He described that, when appellant sat back down, he pushed the chair out from under him with his left hand and fell to the ground.[3] RM. alleged that appellant started to laugh and did not look hurt. He noted that appellant wanted to continue the discussion.

In a December 5, 2017 e-mail, E.G., a coworker, explained that on November 13, 2017 appellant stood up approximately six feet away from her. She related that, as he began to sit down in his chair, the chair rolled backwards and he "slid" onto the floor. E.G. indicated that appellant remained on the floor until she offered to assist him. She noted that he did not wish to end the mediation session.

T.Q., a maintenance and operations supervisor, related in a November 21, 2017 e-mail that appellant had come to work that day to complete the required form for a work-related injury, but he was unable to do so.

[2] The record reveals that appellant has a prior claim under File No. xxxxxx741, which OWCP accepted for cervical and thoracic sprains causally related to a July 18, 2016 employment injury. Under File No. xxxxxx033, OWCP accepted lumbosacral strain, kidney contusion, and lower back muscle spasms as a result of an April 26, 2017 employment injury. Appellant stopped work and returned to modified duty on August 21, 2017.

[3] An e-mail from P.G. to T.Q., dated November 30, 2017, indicated that all the chairs in room 113 were examined and none of them appeared to be in need of repair.

Appellant explained in a December 11, 2017 narrative statement that on the morning of November 13, 2017 he was in Building 62 participating in a meeting with three other people. He indicated that he stood up from his chair and when he attempted to sit back down, the chair suddenly and unexpectedly flipped upward and rolled way, causing him to fall and land backward. Appellant described that he fell down with a weight of 235 pounds, from a height of between four to five feet. He reported that the impact was strong enough to cause immediate bruising. Appellant asserted that the chair's design was not recommended by the Occupational Safety and Health Administration (OSHA) and that the room appeared cluttered. He asserted that he sought medical treatment on November 15, 2017 as soon as the employing establishment completed an authorization for examination and/or treatment (Form CA-16). Appellant indicated that he completed his portion of the Form CA-1 on November 30, 2017, but he was having trouble accessing his account so it was not submitted until December 4, 2017. He reported that, after the mediation meeting, he went to the union office and the Equal Employment Opportunity (EEO) office and was instructed to go to employee health. Appellant further alleged that he was not upset in a way that contributed to his injury and he did not have an emotional reaction. He also noted that he did not have prior back injuries.

In a November 13, 2017 occupational health note, Teresa Chong, a nurse practitioner, reported that appellant had informed her that he had fallen to the floor when the chair he was going to sit down in rolled out of the way. Examination of appellant's lumbar spine showed mild stiffness and full range of motion. Ms. Chong authorized him to work with restrictions.

On November 15, 2017 the employing establishment issued appellant a completed Form CA-16, which indicated that he was authorized to seek medical treatment from Dr. Steven P. Abreu, a Board-certified internist, for his claimed November 13, 2017 lumbar strain injury. On the attending physician's report (Form CA-20) Dr. Abreu noted a November 13, 2017 date of injury and indicated that appellant "fell backwards at work." He reported findings of pain and decreased range of motion of the lumbar spine. Dr. Abreu diagnosed lumbar strain. He checked a box marked "yes" indicating that appellant's condition was caused or aggravated by the employment activity. Dr. Abreu noted "fall led to pain."

OWCP received additional reports by Dr. Abreu dated November 21 and 28, 2017. Dr. Abreu related that on November 13, 2017 appellant had fallen backwards and struck his back at work. Examination of appellant's lumbar spine demonstrated mild ecchymosis over the lumbar spine and pain with flexion, lateral flexion, and rotation. Dr. Abreu diagnosed low back sprain "related to the fall and microscopic hematuria possibly related to a renal contusion." He also provided progress notes dated July 19 to August 18, 2017 regarding treatment for appellant's complaints of back pain.

Dr. Abreu provided additional CA-20 forms and a work capacity evaluation form (OWCP-5c) dated December 11 and 19, 2017. He indicated that appellant "fell to ground while trying to sit at a work meeting on [December 13, 2017]." Dr. Abreu provided examination findings and diagnosed lumbar strain and hematoma. He checked a box marked "yes" indicating that appellant's condition was caused or aggravated by an employment activity.

On December 13, 2017 appellant provided a statement outlining the timeline of events beginning with the alleged November 13, 2017 employment incident. He alleged that the Form

CA-1 submitted by the employing establishment on December 5, 2017 was not a true representation of the Form CA-1 that he completed on November 30, 2017. Appellant provided a copy of the November 30, 2017 Form CA-1.

In a December 13, 2017 letter, the employing establishment explained that the program specialist, who initially completed the Form CA-1, was unable to provide all of the information written from the form that appellant had completed due to limited space on the electronic form.

On December 20, 2017 appellant returned to work in a full-duty capacity.

In a development letter dated December 20, 2017, OWCP requested that the employing establishment provide additional evidence to support its contention that appellant's alleged November 13, 2017 injury was due to willful misconduct. It was afforded 30 days to respond.

In a December 20, 2017 e-mail, E.K. reported that it looked like appellant had his hands on the chair arms and that appellant slowly lowered himself to the floor. In a December 21, 2017 e-mail, R.M., an engineering service chief, related that appellant had a history of filing for workers' compensation. He asserted that appellant knew the chair had wheels and was not stationary since, during the meeting, appellant kept sliding his chair around. R.M. related that, after appellant stood up to give the mediator a piece of paper, he pushed the chair back with his left hand when he sat back down. He indicated that appellant had a huge smile on his face when he fell to the floor. R.M. further reported that a couple of days later appellant was on sick leave for the alleged back injury, but was seen riding his motorcycle into work to complete his documentation for workers' compensation claim.

On December 30, 2017 OWCP received a Form CA-1 with appellant's responses to the employing establishment's challenge. Appellant related that the meeting ended at approximately 1:30 p.m. and he immediately stopped by the EEO and Union Office. He noted that at approximately 1500 (3:00 p.m.) he went to see his supervisor and reported the injury. Appellant asserted that his injury did not prevent him from walking, only from performing his duties.

By decision dated January 19, 2018, OWCP denied appellant's traumatic injury claim, finding that the factual evidence of record was insufficient to establish that the November 13, 2017 incident occurred in the performance of duty, as alleged. It noted that witness statements and his actions surrounding the claimed employment incident cast doubt on the validity of the claim.

On February 28, 2018 appellant requested a review of the written record by an OWCP hearing representative.

By decision dated June 20, 2018, an OWCP hearing representative affirmed the January 19, 2018 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable

time limitation period of FECA,[4] that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.[5] These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[6]

In order to determine whether a federal employee has sustained a traumatic injury in the performance of duty, OWCP must first determine whether fact of injury has been established.[7] There are two components involved in establishing fact of injury. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place, and in the manner alleged.[8] Second, the employee must submit evidence, in the form of probative medical evidence, to establish that the employment incident caused a personal injury.[9]

An employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.[10] Moreover, an injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury in the performance of duty, as alleged, but the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.[11] An employee has not met his or her burden of proof to establish the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim. Circumstances such as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury, and failure to obtain medical treatment may, if otherwise unexplained, cast sufficient doubt on an employee's statement in determining whether a *prima facie* case has been established.[12]

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[4] *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

[5] *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[6] *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[7] *S.P.*, 59 ECAB 184 (2007); *Alvin V. Gadd*, 57 ECAB 172 (2005).

[8] *Bonnie A. Contreras*, 57 ECAB 364 (2006); *Edward C. Lawrence*, 19 ECAB 442 (1968).

[9] *David Apgar*, 57 ECAB 137 (2005); *John J. Carlone*, 41 ECAB 354 (1989).

[10] *D.B.*, 58 ECAB 529 (2007); *Gregory J. Reser*, 57 ECAB 277 (2005).

[11] *Gene A. McCracken*, Docket No. 93-2227 (issued March 9, 1995); *Joseph H. Surgener*, 42 ECAB 541, 547 (1991).

[12] *Betty J. Smith*, 54 ECAB 174 (2002).

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish a traumatic injury in the performance of duty on November 13, 2017, as alleged.

Initially, the employing establishment controverted the claim alleging an affirmative defense of willful misconduct. OWCP's use of an affirmative defense in denying a claim must be invoked in the original adjudication of the claim, and it has the burden to prove such a defense.[13] In the original January 19, 2018 decision, OWCP did not make specific findings regarding misconduct as an affirmative defense, but rather found that appellant had not established fact of injury. Accordingly, the affirmative defense of willful misconduct is not at issue in this case.[14]

OWCP denied appellant's claim based on fact of injury, finding that witness statements and appellant's actions surrounding the alleged November 13, 2017 injury cast doubt on whether he had sustained an injury at the time, place, and in the manner alleged. In his Form CA-1, appellant claimed that he sprained his back when he "fell as he went to sit back down in his chair" at work. He later provided a more detailed statement. Appellant related that on the morning of November 13, 2017 he was participating in a mediation meeting with three other people. He explained that he stood up from his chair to hand a paper to the mediator and while he was sitting back down, the chair suddenly flipped upward and rolled way, causing him to fall down. Appellant alleged that the impact of his fall was strong enough to cause immediate bruising.

The Board notes that there is no inconsistency in the evidence of record with regard to the time and place of appellant's alleged injury. The Board finds, however, that there are sufficient inconsistencies surrounding the manner in which he allegedly sustained a back injury to deny fact of injury. Specifically, statements from witnesses and appellant's coworkers cast serious doubt on the validity of appellant's claim and overcome the probative value generally afforded to a claimant's statement of how he was injured.[15]

In a November 22, 2017 statement, R.M., a witness who was present during the mediation session, related that appellant became emotionally irate during the meeting. He reported that appellant partially stood up to give the mediator a document and kept his left hand on the chair's armrest. R.M. noted that when appellant sat back down, he pushed the chair out from under him with his left hand and fell to the ground. He alleged that appellant started laughing and wished to continue with the mediation. E.G., another witness present at the mediation session, likewise reported that as appellant began to sit down, his chair rolled backwards and appellant "slid" onto the floor. She related that he did not wish to end the mediation. In a December 20, 2017 e-mail, E.K., a third witness at the mediation, described that appellant had stood up and appeared to slowly lower himself to the floor.

[13] *See B.P.*, Docket No. 17-058 (issued March 12, 2018); *see also Brenda J. Bouette*, Docket No. 05-1477 (issued December 14, 2005).

[14] *See A.P.*, Docket No. 18-0886 (issued November 16, 2018).

[15] *See D.P.*, Docket No. 18-0190 (issued May 22, 2018).

The Board finds that the uniformity in the three witness statements corroborate that appellant did not fall, but rather was aware that the chair was rolling away and lowered himself onto the floor. Appellant has not provided evidence into the record to indicate that R.M., E.G., or E.K. were biased against appellant's version of the incident. Additionally, there is no reason to discount their version of the incident and observance of appellant's behavior. The Board finds that these statements cast serious doubt on the validity of appellant's claims.[16]

The Board thus finds that appellant, has not met his burden of proof to establish that the November 13, 2017 incident occurred in the performance of duty, as alleged. Consequently, it is unnecessary to address the medical evidence of record.[17]

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.[18]

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a traumatic injury in the performance of duty on November 13, 2017, as alleged.

[16] *See A.B.*, Docket No. 14-0522 (issued November 9, 2015) (the Board found that a claimant did not establish fact of injury when statements by the claimant's coworker and supervisor indicated that the claimant staged a fall and were not consistent with the claimant's version of events).

[17] *See M.P.*, Docket No. 15-0952 (issued July 23, 2015); *Alvin V. Gadd*, 57 ECAB 172 (2005).

[18] The Board notes that it appears that the employing establishment issued appellant a signed authorization for examination and/or treatment (Form CA-16) authorizing treatment. The Board has held that where an employing establishment properly executes a CA-16 form, which authorizes medical treatment as a result of an employee's claim for an employment-related injury, it creates a contractual obligation which does not involve the employee directly to pay the cost of the examination or treatment regardless of the action taken on the claim. *See* 20 C.F.R. §§ 10.300, 10.304; *R.W.*, Docket No. 18-0894 (issued December 4, 2018).

ORDER

IT IS HEREBY ORDERED THAT the June 20, 2018 merit decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 27, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board